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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1182

UNITED STATES BROADCASTING COMPANY, INC., a CORPORATION, and U.B.S. SALES, INC., a Corporation, and their officers, and RICHARD EATON,

Petitioners,

versus

JAY J. ARMES,

Respondent.

BRIEF OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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No. 74-1182

UNITED STATES BROADCASTING COMPANY, INC, a CORPORATION, and U.B.S. SALES, INC., a Corporation, and their officers, and RICHARD EATON,

Petitioners,

versus

JAY J. ARMES,

Respondent.

Brief of Respondent in Response to Petition for a Writ of Certiorari to the United States Court of Appeal for Fifth Circuit

---

JAY J. ARMES, Respondent, prays that a Petition for a WRIT OF CERTIORARI to review judgments of the United States Court of Appeals for the Fifth Circuit, entered in the above styled and numbered cause on January 20, 1975, be denied.

OPINION BELOW

The opinion delivered in the Court of Appeals for the Fifth Circuit is reported at 506 F.2d 766 (5th. Cir., 1975)

The opinion was delivered on January 20, 1975. The Motion for Rehearing was denied on February 10, 1975.

JURISDICTION

Jurisdiction of the United States District Court for the Western District of Texas, El Paso Division was invoked pursuant to 28 U.S.C. Section 1332. Respondent does not question the jurisdiction as set forth in the Petition for a WRIT OF CERTIORARI.

QUESTIONS PRESENTED

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CORRECTLY HELD:

I.

DISTRICT COURT'S INSTRUCTIONS CONCERNING THE ASSESSMENT OF ARMES' CREDIBILITY, TAKEN IN CONTEXT, WERE NOTHING MORE THAN ATTEMPT TO INFORM THE JURY THAT THEY SHOULD CONSIDER ALL OF THE CIRCUMSTANCES.

II.

THE JUDGMENT FOR ARMES WAS CORRECTLY BASED UPON PRIOR AND SUBSEQUENT ORAL AGREEMENTS WHICH WERE NOT INCLUDED IN THE MARCH 6, 1971 WRITTEN CONTRACT.

III.

RECOVERY OF ORALLY AGREED FEE OF $80.-000.00 WAS NOT DEPENDENT UPON THE SALE OF RADIO STATION XEWG.

STATEMENT OF THE CASE

Respondent sets forth the salient facts of this case because of certain inaccuracies and misleading statements in the PETITION FOR A WRIT OF CERTIORARI.

Mr. Richard Eaton, Appellant, solicited the services of Mr. Jay J. Armes, Appellee, a Private Investigator in El Paso, Texas to locate and return Appellant's daughter, Alma Maude Eaton. On April 29, 1970, the parties concluded an oral agreement pursuant to which Mr. Armes was to recover the child who was believed to be in the City of Juarez, Mexico. Mr. Armes was paid the agreed fee of $1,500.00 and was given a Power of Attorney (Plaintiff's Exhibit "W"). After diligent search, Mr. Armes reported to Mr. Eaton that Appellant's daughter had been taken to the interior of Mexico by Estela Vega Padilla. Mr. Armes and Mr. Eaton then entered into a second oral agreement pursuant to which Mr. Armes was to recover the child from the interior of Mexico. Further, Mr. Eaton requested that Mr. Armes recover title for Mr. Eaton to all properties Mr. Eaton had entrusted to Estela Vega Padilla, to-wit: Radio Station, XEWG located in Juarez, Mexico, Radio Station XESM located in Mexico City, Mexico, and a house in Chevy Chase, Maryland. Mr. Armes was promised compensation for all

such future work in the amount of $80.000.00, plus expenses.

For nearly one year thereafter Mr. Armes worked on his assignment, and Mr. Eaton paid the expenses therefor, and often repeated such promises. Mr. Armes returned the child to Mr. Eaton on October 20, 1970 (Plaintiff's Exhibit "X"). On March, 1971, Mr. Armes completed most of the arrangements for the return to Mr. Eaton's property. The parties then entered into a third agreement (Defendant's Exhibit "I") on March 6, 1971. This written agreement recited that when Mr. Armes turned over the deed to the Maryland property and the papers necessary for the transfer of the Radio Station, XEWG would be sold within thirty days and 20% of the proceeds would be given to Mr. Armes in payment for his services. Mr. Armes then proceeded to recover all the assets enumerated on the contract, as well as perform new and additional assignments such as run Radio Station XEWG for Mr. Eaton, negate the Mexican adoption of Alma Maude Eaton, Defend Rosa Maria Gonzalez Dominguez, have charges dropped against Estela Vega Padilla, and obtain the release of Estela Vega Padilla from jail. Appellee thereafter requested payment and was given many excuses and was placated, even though Appellant recognized the debt (Plaintiff's Exhibit "K"). Thereafter, Appellee filed a civil suit in Juarez, Mexico to recover his debt. Mr. Eaton filed suit in the United States District Court, Western District of Texas, and obtained an injunction against Mr. Armes for preceeding on his civil suit filed in Juarez, Mexico. Mr. Armes then filed a counter claim herein for his fee. The jury returned a verdict in favor of Mr. Armes and the Court entered judgment of $80.000.00 plus court costs, from which Mr. Eaton

appealed to the United States Court of Appeals for the Fifth Circuit. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the United States District Court, Western District of Texas and Mr. Eaton filed a Petition for a WRIT OF CERTIORARI.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Summary Of Argument

Appellants do not challenge the validity or interpretation of many Federal Statutes, or of any rule of law, or of any statutes, or the application thereof, nor do Appellants allege conflicting opinions among Circuit Courts of Appeal. Appellants request A WRIT OF CERTIORARI solely to review the findings of fact between private litigants which have been determined by the jury, by the United States District Court Judge, and by the United States Court of Appeals for the Fifth Circuit. Appellants do not allege that such findings are clearly erroneous but rather argue isolated interpretations and inflammatory incidents which are out of context with the entire case. Appellants disregard the applicable principals of review that the findings of fact determined by the jury, by the United States Court, and the United States Court of Appeals for the Fifth Circuit will be final unless attacked as being clearly erroneous and that all conflicts and reasonable inferences of which the evidence is fairly susceptible should be drawn in favor of the judgment rendered below.

I.

The Court Of Appeals For The Fifth Circuit Correctly Held That The District Court's Instructions Concerning The Assessment Of Armes' Credibility Taken In Context, Were Nothing More Than Attempt To Inform The Jury That They Should Consider All Circumstances.

It is the general rule of the law of conflicts that a party seeking to recover under foreign law has the burden to plead and prove such foreign law. However, there is an exception to the general rule when the system of jurisprudence of the foreign country is different from that of the forum. NUSSBAUM, THE PROBLEM OF PROVING FOREIGN LAW, 50 Yale L.J. 1018 (1941); CURRIE, ON THE REPLACEMENT OF THE LAW OF THE FORUM, 58 Cal. L. Rev. 964 (1958); EHRENZWEIG, CONFLICT OF LAWS (1962). This exception is applicable here as Texas is a common law State and Mexico is a Civil Law Country. MEXICAN CENTRAL RAILWAY CO. V. MARSHALL, 91 F. 933 (5th. Cir., 1899).

Further, neither party seeks here to recover under the foreign law. The Appellants are trying to show that the Mexican Law is similar to the law of the State of Texas and states that the District Court was in error in failing to presume similarity in the laws of the State of Texas and Country of Mexico because there were no pleadings or proof to show the legality of the practice of mordida in Mexico. However, jurisprudence of the State of Texas abounds with predecent which decrees

a great dissimilarity between Texas Law and Mexican Law. EL PASO AND JUAREZ TRACTION CO. V. CARUTH, 255 S.W. 159 (Tex. Comm. App., 1923); CARTER V. TILLERY, 257 S.W. 2d. 465 (Tex. Civ. App. — Amarillo, 1953, Writ Ref'd, N.R.E.); MEXICAN NATIONAL RAILWAY COMPANY V. JACKSON, 89 Tex. 107, 33 S.W. 857 (1896); SLATER V. MEXICAN NATIONAL RAILWAY COMPANY, 194 U.S. 120, 24 S. Ct. 581, 48 L. Ed. 900 (1904). It would therefore seem unreasonable as a matter of law to enter a presumption as to the similarity of the laws of two states in this instance because of the multitude of evidence which in fact shows the state of the law and the common practice of mordida in the Country of Mexico. The Appellee testified that mordida is commonly given in Mexico to public officials to assist in a case and that was the way that things were done there. (Doc. 92, pp. 308-309). Appellants complain that there is no credible evidence or concludings to support this fact. However, Appellee is a member of the World Secret Service, Private Investigators of the World, Interpol, the Sheriff's Reserve of El Paso County, The Clinic of Private Investigators of Los Angeles, California. (Doc. 92, p. 136) and he is well versed in the legalities of that Country, as he continually operates in the Country of Mexico. Further, Appellant was aware of all the expenses and condoned each of them as each expenditure was being made (Doc. 92, pp. 180-186, P. 390). Appellants own witness testified that he had been involved in these kind of transactions in Mexico and Europe and insinuated that there was nothing of any consequences by these actions (Doc. 92, pp. 260-261). Further, this fact of life is common knowledge along the border of Mexico and is well known to the Courts, the jury, and to counsel, and would not have provided a

defense to the Appellants herein, or even cast doubts on the credibility of any of the witnesses. Appellants argue that the import of the testimony of Mr. Gonzalez Vargas can not be interpeted as condoning the system of mordida. However, the jury and the trial court listened to such testimony and resolved it against the Appellant. If there is a conflict, it can only be resolved in favor of the judgment. MERRYMAN V. BOURNE. 76 U.S. 592, 9 Wall. 592, 19 L. Ed. 683 (1869).

The place of performance of the contract was Mexico. The assets to be recovered were in Mexico. Title to all of the assets were determined under Mexican Law. All expenditures were made in Mexico. The forms state would have little interest in applying its law to assess the conduct of private litigant conducting transaction outside the jurisdiction of Texas. SEGUROS TEPEYAC, S. A. COMPANIA MEXICANA V. BOSTROM, 347 F.2d 168 (5th Cir., 1965); LEFLAR CONFLICT OF LAWS (1959).

The District Court made certain comments to the jury during the trial concerning this issue which were examined extremely closely by the United States Court of Appeals for the Fifth Circuit. Most of the oral argument of counsel concerned this very issue. However, the contract called for no illegal act, either implicitly or by its terms and illegality was not raised as an affirmative defense in the trial court. KAHN V. HARRIS, UPHAM AND COMPANY, 247 S.W. 2d 139. 142 (Tex. Civ. App. — San Antonio, 1952), Aff'd, 151 Tex. 655, 253 S.W. 2d 647 (1952); CITY OF GALVESTON V. O'MARA, 146 S.W. 2d 416, 420 (Tex. Civ. App. — Galveston, 1940) Aff'd Sub. Nom., CITY

OF GALVESTON V. HEFFERNAN. 138 Tex. 16, 155 S.W. 2d 912 (1941). The Court of Appeals found that "trial judge expressed his beliefs that Armes' use of bribery and other questionable practices in return of Eaton's property should be viewed in light of the *prevelances* of such practices in Mexico. The trial court made it clear that the jury was not to take his comments as approval of Armes' action. These comments were part of the trial judge's instructions to the jury concerning the importance of assessing the credibility of witnesses. The Court of Appeals for the Fifth Circuit therefor found that "taken in context, the trial court's observation were nothing more than an attempt to inform the jury that they should consider all of the circumstances in assessing the impact of an illegal act on Armes' credibility. We find no error in his comments. SEABIRD V. BLUERIDGE RURAL ELECTRIC COOPERATIVE, 356 U.S. 525, 540, 78 S. Ct. 893, 902, 2 L. Ed. 2d 953 (1958)."

Appellants argues that the majority of the defense of this case centers upon the credibility of Mr. Armes. This is evident in view of the fact that the complete performance by Mr. Armes was readily admitted by the Appellant (Doc. 28, Paragraph VI; Doc. 92 pp. 445, pp. 455-459) and the credibility of Mr. Eaton was immediately suspect by his denial at trial of ownership of the assets located in Mexico (Doc. 92, pp. 402-405) when the contract set forth the express purpose of the contract ". . . to recover for the second party (Eaton) the real property and other assets held by Estella Vega and belonging to the second party . . ." (Eaton) (Plaintiff's Exhibit "I"). However, Appellant had his opportunity to present evidence attacking the credibility of

Mr. Armes and did so. However, the jury, and the United States District Court and the United States Court of Appeals for the Fifth Circuit foreclosed that factual issue against the Appellant. LAWRENCE V. McCALMONT, 43 U.S. 426, 2 How. 426, 11 L. Ed. 326 (1844); DENIS V. DENVER & R. G. W. R. CO. 375, U.S. 208, 84 S. Ct. 291, 11 L. Ed. 2d 256 (1963).

II.

The Court Of Appeals For The Fifth Circuit Correctly Held That The Judgment For Armes Was Correctly Based Upon Prior And Subsequent Oral Agreements Which Were Not Included In The March 6, 1971 Written Contract.

The Appellants contend that all prior oral agreements are barred by the parol evidence rule and the doctrine of merger. HARVILLE ROSE SERVICE V. KELLOGG COMPANY, 448 F.2d 1346 (5th Cir., 1971); and MATHEWS V. DREW CHEMICAL CORP., 475 F.2d 146 (5th Cir., 1973). However, there are no merger clauses in the written contract of March 6, 1971 and prior oral agreements between the parties are supported by separate considerations, concern matters unrelated to those enumerated in the written contract, and which Mr. Armes fully performed. At issue also are additional oral and written promises which were made after March 6, 1971 which also provided for payment to Mr. Armes in the amount of $80.000.00 for the entire job.

Appellee testified that prior to the execution of the written agreement, that the Appellant had agreed to

the payment of a fee of $80,000.00 for all of the services which were performed from April 29, 1970 to that date. (Doc. 92, pp. 144-146). The written agreement thereafter covered only a fraction of the Appellee's services and which concerned only the one week period of the more than one year that the Appellee performed the additional services which concerned the adoption of Alma Maude Eaton (Doc. 92, pp. 146-147), had criminal complaints filed against Estella Vega, (Doc. 92, 00. 147-149), had located and returned Alma Maude Eaton to her father (Doc. 92, pp. 152-153), had been instrumental in supervising the running of Radio Station XEWG, (Doc. 92, pp. 173-175), and defended Rosa Maria Gonzalez from criminal complaints that had been filed by Estella Vega against her (Doc. 92, pp. 162-163). Even after the contract was entered into and executed, the Appellee had been requested to get Estella Vega out of jail, find her a hotel room and outfit her in suitable clothes (Doc. 92, pp. 473-474). Appellee had also been requested to deliver a Contract of Sale to Jesus Hernandez Gutierrez (Doc. 92, p. 162) and to obtain another deed from Estella Vega to the house in Maryland (Doc. 92, pp. 163-164) for which the promise of compensation in the amount of $80,000.00 was continuously reiterated.

This debt was further acknowledged in writing on April 27, 1971, by the promise of the Appellants to pay Appellee 20% of the net profits of the operations of Radio Station XEWG (Defendants Exhibit "K").

The jury evaluated the nature and extent of these services under both the oral and written agreements and correctly found an answer to a special in-

terrogatory, that Mr. Eaton agreed to pay Mr. Armes $80,000.00 plus expenses for his services. Under the charge as it was given to the jury by the Court, the jury further placed a value on the services performed by the Appellee for the Appellant in the amount of $80,000.00. The jury verdict should therefore be conclusive as to the fact of the agreements between the parties. RECONSTRUCTION FINANCE CORP. V. BANKERS TRUST CO., 318 U.S. 163, 63 S. Ct. 515, 87 L. Ed. 680 (1943); SENKO V. LA CROSS DREDGING CORP., 352 U.S. 370, 77 S. Ct. 415, 1 L. Ed. 2d 404 (1957); LAVENDER V. KURN, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946); MITCHELL V. HARMONY, 54 U.S. 115, 13 How. 115, 14 L. Ed. 75 (1851). CUNNINGHAM V. SPRINGER, 204 U.S. 647, 27 S. Ct. 301, 51 L. Ed. 662 (1907).

The Court of Appeals for the Fifth Circuit reviewed and summarized all of the evidence in some detail and found subsequent and prior agreements not covered by the written agreement of March 6, 1971. The Court of Appeals for the Fifth Circuit held that "Whatever the written agreement may provide concerning Armes' fee for the services listed therein, Eaton's promise to pay Armes $80,000.00 for the entire job survives from the prior oral agreement." The Appellants do not complain that such facts are clearly erroneous and the concurrent findings of the jury, United States District Court, and the United States Court of Appeals for the Fifth Circuit should not be disturbed. BRAINARD V. BUCK, 184 U.S. 99, 22 S. Ct. 458, 46 L. Ed. 449 (1902); BAKER V. SCHOFIELD, 243 U.S. 114, 37 S. Ct. 333, 61 L. Ed. 626 (1917); U.S. V. CLARK, 200 U.S. 601, 26 S. Ct. 340, 50 L. Ed. 613 (1906); NEIL V. BIGGERS, 409 U.S

188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); AETNA LIFE INS. CO. V. WARD, 140 U.S. 76, 11 S. Ct. 720, 35 L. Ed. 371 (1891); NEW YORK L. E. & W. R. CO. V. WINTER'S ADN'R, 143, U.S. 60, 12 S. Ct. 356, 36 L. Ed. 71 (1892).

III.

The Court Of Appeals For The Fifth Circuit Correctly Held That Recovery Of Orally Agreed Fee Of $80,000.00 Was Not Dependent Upon The Sale Of Radio Station XEWG.

The Appellants complain that the findings of fact by the Court of Appeals for the Fifth Circuit that "Despite the confusion surrounding the disposition of the Radio Station, there was ample evidence to support the jury finding that the Station was sold and that Eaton received the proceeds." is contrary to the evidence. Appellants state that a judgment for Mr. Armes is not correct if it is based upon such finding of fact.

Appellee would rather show that the United States Court of Appeals for the Fifth Circuit correctly held that ". . . the jury was correct in finding that Eaton promised Armes $80,000.00 for his services, the amount for which Radio Station was sold does not affect Armes' right under the contract. Nor is Armes' recovery dependent upon whether the Station was actually sold. Although the sale of the Radio Station was mentioned in the oral agreement, Eaton's oral promise to pay $80,000.00 for Armes' services was not tied to any specific proceeds. The promise given by Eaton in the March 6, 1971 written agreement merely identified

one source on which Armes could depend for compensation for his work. The sale of the Station was part of Eaton's obligations under that agreement, not a contingent precedent to those obligations. If Eaton failed to sell the Station he breached the agreement just as surely as if he had sold the Station but refused to give Armes any of the proceeds."

Appellee does not assign error to that finding of the jury or of the United States Court of Appeals for the Fifth Circuit. The jury also found that the reasonable value of the services performed by Mr. Armes for Mr. Eaton was $80,000.00. There are therefor two separate factual and unchallenged basis upon which judgment can be rendered to the exclusion of the fact of the sale of Radio Station XEWG. Such facts should not now be reviewed. McLOUGHLIN V. RAPHAEL TUCK & SONS CO., 191 U.S. 267, 24 S. Ct. 105, 48 L. Ed. 178 (1903). EL PASO & S.W.R. CO. V. VIZARD, 211 U.S. 608, 29 S. Ct. 210, 53 L. Ed. 348 (1909).

The Court of Appeals for the Fifth Circuit did hold however, ". . . that there is evidence in the record that a sale did take place." The Court reviewed the evidence that "Armes testified that Eaton told him that the Station had been sold to a Mexican Company called Escarga represented by Jesus Hernandez Gutierrez. The record includes a Sale Contract reciting that Gutierrez is to pay $400,000.00 to Richard Eaton for Radio Station XEWG, and that U.B.C. Sales, Inc., is to hold promissory note in that amount until full payment is received. The record also contains a state-executed by Gutierrez, as owner of XEWG, authorizing the payment of all monies due the Radio Station to U.B.C.

Sales, Inc." The United States Court of Appeals for the Fifth Circuit then correctly held that "despite the confusion surrounding the disposition of the Radio Station, there was ample evidence to support the jury's finding that the Station was sold and Eaton received the proceeds." MAYOR AND ALDERMEN OF CITY OF MOBILE ESLAVA, 41 U.S. 234, 61 Pet. 234, 10 L. Ed. 948 (1842); MERRYMAN V. BOURNE, Supra; NORTHWESTERN UNION PACKET CO. V. McCUE, 84 U.S. 508, 17 Wall. 508, 21 L. Ed. 705 (1873); PARKS V. TURNER, 53 U.S. 39, 12 How. 39, 13 L. Ed. 883 (1851).

CONCLUSION

For the reasons set forth above, Respondent respectfully submits that the PETITION FOR A WRIT OF CERTIORARI should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, MARSHALL I. YAKER, Attorney for JAY J. ARMES, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the ____ day of April, 1975, I served copies of the foregoing Brief in Response to PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT on MR. JAMES F. HULSE, Esquire, Attorney for UNITED BROADCASTING COMPANY, INC., a Corporation, U. B. C. SALES, INC., a Corporation, and their officers, and RICHARD EATON, Petitioners, at his office at Suite 11-D, El Paso National Bank Building, El Paso, Texas 79901, by mailing copies in fuly addressed envelopes, with first class postage prepaid.

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